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Supreme Court, U.S.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ARTURO CASILLAS,
OMERO P. LUNA,
Appellants

v.

THE STATE OF TEXAS,
Appellee

Appeal From The Court of Criminal Appeals of Texas
Cause No. 304-84

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the pre-emption doctrine of the Supremacy Clause of the Constitution bars Texas State Courts from exercising jurisdiction to enforce violations of Federal Regulations promulgated by the Small Business Administration under authority of Congress by applying Tex. Penal Code Ann. section 32.45 (1974) to a small business investment company licensed under the Small Business Investment Act of 1958.

2. Whether the language "substantial risk of loss" in Tex. Penal Code Ann. section 32.45 (1974) is unconstitutionally void for vagueness in violation of the due process clause of the 14th Amendment as applied to appellants.

LIST OF PARTIES

1. Appellants are Arturo Casillas and Omero P. Luna.
2. Appellee is the State of Texas.

Other parties in interest include:

1. Jose Aguilar, one of the original five appellants in the Court of Criminal Appeals of Texas.
2. The Hon. Ronald Earle, District Attorney of Travis County, Texas.
3. The Hon. Robert Huttash, Prosecuting Attorney for the State of Texas.
4. The Hon. Jim Mattox, Attorney General of Texas.

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THE STATE OF TEXAS,
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Appeal From The Court of Criminal Appeals of Texas
Cause No. 304-84

JURISDICTIONAL STATEMENT

Arturo Casillas and Omero P. Luna, the appellants, appeal from the final judgment of the Court of Criminal Appeals of Texas, dated July 2, 1986, holding that 13 C.F.R. § 107.1004 (1975) is a law within the meaning of Tex. Penal Code Ann. section 32.45 (1974), and, therefore, the exercise of jurisdiction by Texas state courts to enforce violations of federal regulations promulgated by the Small Business Administration under

authority of Congress by applying Tex. Penal Code Ann. section 32.45 (1974) to a small business investment company licensed under the Small Business Investment Act of 1958 is not unconstitutional as being repugnant to the laws of the United States.

Appellants also appeal from the final judgment of the Court of Criminal Appeals of Texas, dated July 2, 1986, affirming the decision of the Court of Appeals for the Third Supreme Judicial District of Texas, at Austin, holding that Tex. Penal Code Ann. section 32.45, as applied in this case, is not unconstitutional as being violative of appellants' right of due process of law guaranteed by the 14th Amendment of the Constitution of the United States.

OPINIONS BELOW

The opinion of the Court of Criminal Appeals of Texas is not yet reported. It is reprinted in the appendix hereto, p. 1a, infra.

The opinion of the Court of Appeals for the Third Supreme Judicial District of Texas, at Austin is unpublished. It is reprinted in the appendix hereto, p. 25a, infra.

JURISDICTION

The judgment of the Court of Criminal Appeals of Texas, affirming the decision of the Court of Appeals for the Third Supreme Judicial District of Texas, at Austin, was entered on July 2, 1986. A motion for rehearing and amended motions for rehearing were denied on July 8, 1987, (p. 45a - 46a).

A notice of appeal to this Court was timely filed in the Court of Criminal Appeals of Texas on August 21, 1987, (p. 47a - 52a).

This appeal is being docketed in this Court within 90 days from the denial of rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. section 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. Article VI., cl. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. Amendment XIV, section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

13 C.F.R. section 107.1004(b)(1)

A Licensee shall not, directly or indirectly, provide Financing to any of its Associates.

TEX. PENAL CODE ANN. section 32.45

(a) For purpose of this section:

(1) "Fiduciary" includes:

(A) trustee, guardian, administrator, executor, conservator, and receiver;

(B) any other person acting in a fiduciary capacity, but not a commercial bailee; and

(C) an officer, manager, employee, or agent carrying on fiduciary functions on behalf of a fiduciary.

(2) "Misapply" means deal with property contrary to:

(A) an agreement under which the fiduciary holds the property; or

(B) a law prescribing the custody or disposition of the property.

(b) A person commits an offense if he intentionally, knowingly, or recklessly misapplies property he holds as a fiduciary or property of a financial institution in a manner that involves substantial risk of loss to the owner of the property or to a person for whose benefit the property is held.

HOW THE FEDERAL QUESTIONS WERE RAISED

Appellants directly raised their claim that Texas courts have no jurisdiction of the crime of misapplication of fiduciary property belonging to a small business investment company, such as Tejas Investment Corporation, for the reason that such crime is distinctly and separately covered in 18 U.S.C. section 657, and Congress, by necessary implication, intended that jurisdiction over it be conferred exclusively on the federal courts pursuant to 18 U.S.C. section 3231. This claim was raised by the Appellant for the first time in their amended motion for

rehearing which was denied by the Court of Criminal Appeals of Texas on July 8, 1987. (p. 55a, infra)

Appellants directly raised their claim that the Court of Criminal Appeals has no jurisdiction to find the appellants violated the conflicts of interest regulation governing SBA licensees, 13 C.F.R. section 107.1004 (1975), since the federal statute under which this regulation was promulgated, 15 U.S.C. section 687d, places enforcement of this regulation within the exclusive jurisdiction of the SBA. The Appellants raised their claim to the Court of Criminal Appeals of Texas for the first time in their amended motion for rehearing which was denied by the Court of Criminal Appeals of Texas on July 8, 1987. (p. 58a, infra)

Although not required by Texas procedure, in hindsight, appellants admit that the better practice would have been to raise the issue of jurisdiction as early as the trial level.

However, appellants advance the contention that the Court of Criminal Appeals of Texas brought the question of state versus federal jurisdiction of this case into issue by their own discussions and holding throughout their opinion dated July 2, 1986. Specifically, the Court of Criminal Appeals of Texas stated:

> The State argues to this Court, and we agree, that the most cogent theory for misapplication is that appellants violated the applicable conflicts of interest regulation governing SBA licensees, 13 C.F.R. 107.1004 (1975). The regulation was discussed by a State's witness, and a copy of it was in evidence for the jury. It provides, in part: "A Licensee shall not, directly or indirectly, provide Financing to any of its Associates."

Appellants also points out that it was not until the Court of Criminal Appeals of Texas' opinion dated July 2, 1986 that the independent state ground for conviction was dispensed with by the Court of Criminal Appeals, thus, for the first time enabling appellants to effectively raise the federal questions concerning lack of state jurisdiction by way of their amended motion for rehearing. In fn. 1 of their opinion, the Court of Criminal Appeals of Texas stated:

> The second law advanced by the State at trial is Art. 2.41A(4), Tex. Bus. Corp. Act (Vernon's 1986), which imposes joint and several liability upon directors of a corporation who vote for and assent to the making of a loan to an officer or director. We note that this law imposes only limited civil liability, of directors to the corporation until the loan is repayed, and is not a law "prescribing the custody or disposition of the property" as contemplated by V.T.C.A. Penal Code, section 32.45, supra.

By denying appellants' amended motions for rehearing, the Court of Criminal Appeals of Texas rejected the claim that the exercise of jurisdiction by Texas state courts to enforce federal regulations against a small business investment company was repugnant to the laws of the United States.

Appellants first raised their claim that the "substantial risk of loss" language in Tex. Penal Code Ann. section 32.45 (1974) was void for vagueness as applied to them under the due process clause of the 14th Amendment of the United States Constitution in the Court of Appeals for the Third Supreme Judicial District of Texas, at

Austin. The Court of Appeals held that section 32.45 is sufficiently definite to give notice of the character of conduct proscribed.

Appellants petitioned the Court of Criminal Appeals of Texas to review the decision of the Court of Appeals (p. 53a, infra). While accepting review of the Court of Appeals' decision on other grounds, the Court of Criminal Appeals refused to review the specific issue of the constitutionality of the statute (p. 41a, infra). The Court of Criminal Appeals of Texas affirmed the decision of the Court of Appeals (p. 24a, infra). The judgment of affirmance by the Court of Criminal Appeals of Texas constituted an affirmance of the validity of the state statute on federal constitutional grounds and a rejection of the federal constitutional claim.

STATEMENT OF THE CASE

In 1969 the Mexican American Council for Economic Progress (MACEP) was formed as an anti-poverty, non-profit organization in Austin, Texas (R.I-173). In 1973 MACEP applied for and received a grant from the Office of Economic Opportunity for $419,000, of which $150,-000, was initially intended to set up an equity loan fund, money from which was to be loaned as "seed" money to farmworkers desirous of starting their own business ventures. Subsequently, the decision was made that it would prove more beneficial to utilize a Minority Enterprise Small Business Investment Corporation (MESBIC) rather than an equity loan fund. A MESBIC is licensed and regulated by the Small Business Administration for the purpose of providing assistance to socially or economically disadvantaged minority groups (R.I-128). The

MESBIC was licensed on January 24, 1975 and was named Tejas Investment Corporation (R.I-56). Prior to securing the license for the MESBIC (Tejas), MACEP was given a second grant of $350,000 for the period June 1, 1974 through May 31, 1975 by the OEO before it was absorbed into the Department of Labor (DOL).

Appellant Casillas was involved in securing the original grant for MACEP, in his capacity as president of MACEP. Appellant Luna was vice-president at a later time.

In September of 1975, appellants Arturo Casillas and Omero P. Luna plus others were elected as the new board of directors for Tejas Investment Corporation. The new board of directors responded to a critical withdrawal of private funds by deciding to surrender their MESBIC license, reorganize Tejas into a private investment corporation, and create an additional corporation called Perceptions, Inc. MACEP was running out of money and there were no funds from which to pay a staff to write new proposals and obtain other federal funds which were essential to Tejas' continued development. Because they desired that Tejas retain its social purpose, appellants decided to go into business themselves. To finance their business appellants intended to borrow money from Tejas, combine it with their own and pay back the loan with interest to Tejas. (R.III-935) Appellants established a new corporation, Perceptions, Inc., to serve as a holding company for each of their business enterprises. (R.II-347)

The new Tejas transferred $106,000 to Perceptions, Inc., which in turn made loans with this money to individuals, including appellants, who started or purchased their own businesses. Appellants combined the money they borrowed from Tejas with their own funds. Appellant

Casillas invested approximately $25,000 (R.V-1482) and appellant Luna invested $17,000 of his own money. (R.IV-1244) Appellant Casillas signed a note for $37,-000 worth of preferred stock in Taco Village. (R.V-1533)

In June 1977, appellants were indicted along with Jose Aguilar, Robert Amaya and Fernando Hernandez for the offense of misapplication of fiduciary property in an amount exceeding $10,000 in violation of Texas Penal Code Ann. section 32.45 (1974). They were convicted by a jury and each appellant was assessed punishment in the Texas Department of Corrections for a period of twelve years and one day and a $10,000 fine.

Appellants appealed their convictions to the Court of Appeals for the Third Supreme Judicial District of Texas, at Austin. The Court of Appeals affirmed the convictions. Appellants petitioned the Court of Criminal Appeals of Texas to review the decision of the Court of Appeals. The Court of Criminal Appeals, while declining to review the issue of the constitutionality of the statute, did accept review of the case on other grounds and affirmed the decision of the Court of Appeals and the convictions of appellants.

The Court of Criminal Appeals of Texas, while making it plain in their opinion that the State's theory of prosecution was based on a violation of a federal regulation, did not explain the substantial federal question concerning state versus federal jurisdiction of this case.

Also, in affirming the decision of the Court of Appeals, the Court of Criminal Appeals of Texas gave seemingly inappropriate "short shrift" to an important federal question concerning the constitutionality of the statute's vague "substantial risk of loss" language.

THE QUESTIONS ARE SUBSTANTIAL

I. Under the Supremacy Clause of U.S. Const. art. VI Cl. 2 Texas Jurisdiction is Pre-empted by Federal Regulations.

This case appears to mark the first instance of a state court tribunal exercising jurisdiction over a small business investment corporation licensed and regulated by the Small Business Administration in an attempt to enforce a violation of a federal regulation by means of a state penal statute. In the past, this Court, in considering the question of whether the State of Iowa had jurisdiction to apply a state penal statute against an officer of a national bank, in *Easton v. Iowa*, 188 U.S. 220, 229 (1903) stated:

> We think that this view of the subject is not based on a correct conception of the Federal legislation creating and regulating national banks. That legislation has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restriction as various and as numerous as the States.

In 1958 the Congress of the United States enacted the Small Business Investment Act for the express purpose of "stimulate(ing) the national economy in general and the small business segment thereof in particular by establishing a program to stimulate and supplement the flow of private equity capital and long-term loan funds which small business concerns need . . ." 15 U.S.C., section 661.

The clear legislative intent of the Congress of the United States in enacting the Small Business Investment

Act of 1958 was to stimulate the economic growth of those small business investment companies licensed under the provision of the Act. Such a plan as envisioned by Congress obviously would have important nationwide goals and consequences. In order to ensure a consistent and successful administration of the plan. Congress gave the Small Business Administration the power to make rules governing the regulation of those small business investment corporations licensed under the Act. In *Fidelity Federal Savings and Loan Association v. de la Cuesta,* 458 U.S. 139, 153 (1982) the Supreme Court emphasized that "federal regulations have no less pre-emptive effect than federal statutes." In order to establish whether the pre-emption doctrine applies to the case at hand, ". . . the Supremacy Clause, U.S. Const., Art. VI, cl. 2, requires us to examine congressional intent." *Fidelity Federal Savings & Loan Association v. de la Cuesta,* 458 U.S. 152 (1982). There are two methods of pre-emption, express or implied, and pre-emption is "compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.,* 430 U.S. 519, 525 (1977).

15 U.S.C. section 662 defines a "small business investment company" as "a company approved by the (Small Business) Administration to operate under the provisions of this title." Thus, small business investment companies are unique creatures of Congress, which in turn has vested sole power in the Small Business Administration to regulate and control their operation. In *United States v. Hancock,* 441 F.2d 1285 (5th Cir. 1971), *cert. denied,* 404 U.S. 833, appellant was charged with willfully embezzling, abstracting, and willfully misapplying small

business investment company funds in violation of 18 U.S.C.A. section 657. The Fifth Circuit Court of Appeals stated:

> Since Title VII of the Small Business Investment Act of 1958 amended the related criminal provision, we think it clear the reference in section 657 is only to those small businesses licensed under the Act, rather than to all small businesses generally.

Among the powers vested in the Small Business Administration under the Acts is the enforcement of regulatory provisions respecting conflicts of interest in order to effectuate the statutory purpose of providing small business concerns with capital not available from other sources.

Especially relevant to the case at bar is 15 U.S.C. section 687e(e), which provides the following triggering mechanism to enable the Small Business Administration to suspend and/or remove a director or officer from office:

> Whenever any director or officer of a licensee is charged in any information, indictment or complaint *authorized by a United States attorney*, with the commission of or participation in a felony involving dishonesty or breach of trust, the Administration may . . . suspend him from office and/or prohibit him from further participation in any manner in the conduct of the affairs of the licensee. Such suspension . . . shall remain in effect until such information, indictment, or complaint is finally disposed of, or until terminated by the Administration. In the event that a judgment of conviction . . . is entered against such director or officer . . . the Administration may issue . . . an order removing him from office. (Emphasis added)

The plain meaning of this provision is that Congress clearly contemplated that criminal actions for misapplication of fiduciary property belonging to a small business investment company be brought in the federal courts.

18 U.S.C. § 657 states that:

> Whoever, being an officer, agent or employee of, or connected in any capacity with . . . any small business investment company, and whoever, being a receiver of any such institution, or agent or employee of the receiver, embezzles, abstracts, purloins or willfully misapplies any moneys, funds, credits, securities or other things of value belonging to such institution, or pledged or otherwise intrusted to its care, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount or value embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

At the time of the misapplication of fiduciary property alleged against appellants, appellants were officers and directors of Tejas Investment Corporation, a small business investment company licensed by the Small Business Administration (SBA) and subject to the provisions of the Small Business Investment Act, 15 U.S.C. sections 661-687j, and the regulations promulgated thereunder, 13 C.F.R. sections 107.1-107.1302 (1975). The indictment specifically alleged that appellants misapplied property belonging to Tejas.

Whether perceived as friendly or hostile, the prosecution of appellants under Tex. Penal Code Ann. section 32.45 (1974) constituted an improper interference with the laws of the United States which clearly prescribe that

regulation of small business investment companies such as Tejas is vested in the Small Business Administration and that the jurisdiction for enforcement of SBA regulations are solely within the domain of the federal courts.

II. "Substantial Risk of Loss" language in Tex. Penal Code Ann. § 32.45 (1974) does not provide minimal guidelines to govern law enforcement.

Under section 32.45 of the Texas Penal Code, intentionally dealing with property contrary to a law prescribing the custody or disposition of the property that a person holds as a fiduciary is not a crime unless the person misapplies the property in a manner that "involves substantial risk of loss" to the owner of the property. It is readily apparent that the "involves substantial risk of loss" language of the statute should be an area of concern to those wishing to avoid conducting themselves in a manner prohibited by the statute. Also, the statute's language would be of equal importance of law enforcement officials whose job it is to enforce the provisions of the statute in a way that does not encourage arbitrary and erratic arrests and convictions.

This Court has recognized the rule in a long line of cases that all persons are entitled to be informed as to what the State commands or forbids. *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). Indefinite and ambiguous language such as "involves substantial risk of loss" is subject to an infinite variety of interpretations whose differences would seem to vary solely in accordance with the eyes of the beholder. This phraseology does not conform with accepted standards of legislative practice as a definition of a criminal offense.

In grappling with the issue of whether a penal statute creating a new offense was sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, this Court, in *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926) stated:

> And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

Appellant's case is not a situation where Texas appellate courts have by way of precedential decisions over a period of years, narrowed the application of the statutory terms or interpreted the language of the statute in such a way that persons of a mind to obey the law would have ascertainable guidelines to follow. The Court of Criminal Appeals readily admitted to the dearth of legal precedent in their opinion dated July 2, 1986 by pointing out that prior to appellants' case they had only discussed Tex. Penal Code Ann. section 32.45 (1974) in one reported case.

Both the Court of Criminal Appeals of Texas and the Court of Appeals for the Third Supreme Judicial District of Texas, at Austin, in their opinions, focused on the unsecured nature of the loans to appellants and the unsafe manner in which the promissory notes evidencing the indebtedness on appellants' part were kept in finding that appellants dealt with the property in a manner "involving a substantial risk of loss." It is these very type of guidelines which the legislature of the State of Texas could have easily incorporated into the statute at its inception,

thus providing an ascertainable standard of guilt for those persons of a mind to violate the law. Had appellants been given notice that lack of security for the loans and failure to keep the promissory notes in a safe place would subject them to criminal penalties, they, in all likelihood, would not be faced within the dire consequences of incarcertation in the Texas Department of Corrections today. How does one reconcile the irony of appellants' convictions for misapplying property in a manner "involving a substantial risk of loss" with the following language from the Court of Criminal Appeals of Texas' opinion?:

> ". . . our review of the record confirms . . . that the appellants were considered honest and good credit risks, that they jointly reviewed their proposals for feasibility, and that they agreed to invest their personal money in the ventures to insure maximum incentive. Appellants clearly went about their business in a professional, *risk-aversive manner*, and they were not launching into enterprises with the intention to fail. (p. 17a, infra) (Emphasis added)

As written, Tex. Penal Code Ann. 32.45 (1974) constitutes a type of legal "Catch-22" whose broad net can ensnare those who like appellants go about their business in a professional, risk-aversive manner.

Tex. Penal Code Ann. 32.45 (1974), requiring appellants to determine the amount of the risk of loss involved called for a complicated decision by the law's enforcer and a rather accurate perception of what his decision would be by the appellants. The statute required far too much from both.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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APPENDIX A

NO. 304-84

ARTURO CASILLAS, et al,
Appellants

v.

THE STATE OF TEXAS,
Appellee

Petition for Discretionary Review from the Court of Appeals, Third Supreme Judicial District of Texas [Travis County]

OPINION ON APPELLANTS' PETITION FOR DISCRETIONARY REVIEW

Arturo Casillas, Jose Aguilar, Omero Luna, Robert Amaya, and Fernando Hernandez were convicted by a jury for the offense of misapplication of fiduciary property in an amount exceeding $10,000. See V.T.C.A. Penal Code, § 32.45. The jury assessed Amaya's punishment at ten years confinement in the Texas Department of Corrections and a $10,000 fine; the other four appellants each were assessed confinement in the Texas Department of Corrections for a period of twelve years and one day and a $10,000 fine. The appellants were tried jointly, and their appeals were jointly submitted to the Austin Court of Appeals. That court affirmed the judgments of conviction in an unpublished opinion. Casillas, et al (Tex. App.—Austin, Nos. 3-82-216-CR(T) - 3-82-220-CR(T), delivered Nov. 30, 1983). We granted appellants' petitions for discretionary review to examine the court of

Appeals' holdings: (a) that the evidence was sufficient to support the convictions; and (b) that the trial court's refusal to submit requested limiting charges concerning the existence of a conspiracy and the co-conspirator exception to the hearsay rule was not error. We will affirm the decision of the Court of Appeals and the convictions of Casillas, Aguilar and Luna in this opinion. We reverse the convictions of Amaya and Hernandez for insufficiency of the evidence in a companion opinion. See Amaya, (Tex.Cr.App. No. 304-84, delivered July 2, 1986).

I. FACTS

The facts of this case are rather complex, involving many characters and numerous acronyms. We summarize them here, and elaborate further in our discussion of the sufficiency of the evidence.

In 1969 the Mexican American Council for Economic Progress (MACEP) was formed as an anti-poverty, non-profit organization in Austin, Texas. In 1973, MACEP prepared and submitted to the Office of Economic Opportunity (OEO) a grant proposal, pursuant to which MACEP received a $419,000 grant for the economic development of migrant and other seasonally employed farmworkers under Title IIIB of the Economic Opportunity Act of 1964, 42 U.S.C.A. §§ 2861 et seq., repealed, 42 U.S.C.A. § 9912 (West 1983).

Of the $419,000 grant, $150,000 was originally designated to establish an equity loan fund, for purposes of lending "seed" money to farmworkers who wanted to start their own businesses. Rather than establishing the originally proposed loan fund, it was decided by the

OEO representative, at the suggestion of appellant Casillas and another MACEP representative, Mr. Harmon Lisnow, to establish a Minority Enterprise Small Business Investment Corporation (MESBIC), to be licensed and regulated by the Small Business Administration (SBA). The MESBIC was named Tejas Investment Corporation (Tejas), and was licensed on January 24, 1975. The $150,000 was adjusted to $155,000, which MACEP used to purchase 51% of the voting stock in Tejas.

Establishing the MESBIC under SBA regulations required private matching funds of $150,000, which took some time for MACEP to accumulate. Because of the delay, the MESBIC was unable to get its SBA license during the original grant period between June 1, 1973 and May 31, 1974. Therefore a second grant of $350,000 was made to MACEP for the period from June 1, 1974 and May 31, 1975. Meanwhile the OEO was absorbed into the Department of Labor (DOL) in 1973, making DOL the grantor agency of government.

Appellant Casillas was involved in securing the original grant for MACEP, in his capacity as president of MACEP. Appellant Aguilar was vice-president at that time, and appellant Luna was vice-president at a later time. Hernandez was MACEP's bookkeeper, while Amaya was initially a MACEP employee and later became director of the Austin Minority Economic Development Corporation (AMEDC), an organization with informal ties to MACEP.

In September of 1975, with MACEP owning and voting its controlling 51% interest in Tejas, a new board of directors was elected for Tejas. The board consisted of all appellants and one other person, Minnie Briones.

At that point Aguilar, Luna and Casillas were also directors of MACEP, and voted MACEP's controlling votes in Tejas; Aguilar was also an officer of MACEP. The new Tejas board of directors responded to a critical withdrawal of private funds by deciding to surrender their MESBIC license, reorganize Tejas into a private investment corporation, and create an additional corporation called Perceptions, Inc. The new Tejas transferred $106,000 to Perceptions, Inc., which in turn made unsecured loans with this money to the individual appellants, who started or purchased their own businesses.

II. SUFFICIENCY OF THE EVIDENCE

In reviewing the sufficiency of the evidence to support a criminal conviction, we view all of the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed. 2d 560 (1979); Anderson v. State, 701 S.W.2d 868 (Tex. Cr. App. 1985).

Appellants challenge, in various ways, the sufficiency of the evidence to show a misapplication of fiduciary property under V.T.C.A. Penal Code, § 32.45, which provides:

> "(a) For purposes of this section:
>
> (1) 'Fiduciary' includes:
>
> (A) trustee, guardian, administrator, executor, conservator, and receiver;
>
> (B) any other person acting in a fiduciary capacity, but not a commercial bailee; and

(C) an officer, manager, employee, or agent carrying on fiduciary functions on behalf of a fiduciary.

(2) 'Misapply' means deal with property contrary to:

(A) an agreement under which the fiduciary holds the property; or

(B) a law prescribing the custody or disposition of the property.

(b) A person commits an offense if he intentionally, knowingly, or recklessly misapplies property he holds as a fiduciary or property of a financial institution in a manner that involves substantial risk of loss to the owner of the property or to a person for whose benefit the property is held."

A. Misapplication

Appellants Casillas and Luna argue that no misapplication was shown because no dealing contrary to an applicable agreement or law was demonstrated. First, the only proof of an agreement was that between MACEP and OEO/DOL, while the indictment alleges a misapplication of property owned by Tejas. They argue that Tejas was not a grantee, MACEP and Tejas were separate organizations, there was no showing that Tejas was privy to the agreement with MACEP, and Tejas was governed by its own by-laws but those were not in evidence. Second, Tejas surrendered its SBA license prior to the time the loans were made so SBA regulations prohibiting self-dealing did not apply, and no other law "prescribing the custody or disposition of property," § 32.45(a)(2)(B), supra, was applicable.

At trial, the State approached the misapplication issue by both available avenues, with evidence of the MACEP grant agreement as well as evidence of two laws that were allegedly violated by appellants.[1] The Court of Appeals found that the evidence was sufficient to show that the funds were dealt with contrary to the terms of the government grant. The State argues to this Court, and we agree, that the most cogent theory for misapplication is that appellants violated the applicable conflicts of interest regulation governing SBA licensees, 13 CFR 107.1004 (1975). The regulation was discussed by a State's witness, and a copy of it was in evidence for the jury. It provides, in part:

> "A Licensee shall not, directly or indirectly, provide Financing to any of its Associates."

Appellants do not challenge the applicability of this restriction to Tejas as a licensee and themselves as associates, prior to September 26, 1975, and there was testimony that the regulation applied to them. They argue instead that the SBA license was surrendered on that date and that the conflict of interest prohibition no longer applied on November 1, 1975, the date of misapplication alleged in the indictment.

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1. The second law advanced by the State at trial is Art. 2.41A(4), Tex. Bus. Corp. Act. (Vernon's 1986), which imposes joint and several liability upon directors of a corporation who vote for or assent to the making of a loan to an officer or director. We note that this law imposes only limited civil liability, of directors to the corporation until the loan is repayed, and is not a law "prescribing the custody or disposition of the property" as contemplated by V.T.C.A. Penal Code, § 32.45, supra. Examples of laws which do fit § 32.45, supra, are the duties imposed on trustees by the Texas Trust Code, §§ 113.051-113.055 (Vernon's 1984). For example, § 113.052 states, in part: "Except as provided by Subsection (b) of this section, a trustee may not lend trust funds to . . . the trustee or an affiliate; . . ."

On September 26, 1975, all five appellants were serving on the board of directors of Tejas when the decision was made to revoke the MESBIC (SBA) license and reorganize Tejas into a private investment company with no license. Casillas and Luna were authorized to sign checks for the new Tejas, and Luna was named president to replace Mr. Raul Medina, who was asked to resign. On September 30, Casillas wrote to the SBA in his capacity as president of MACEP to inform them of the decision to revoke the license. Appellants' second communication to the SBA regarding the surrender of the MESBIC license was a letter on November 3, 1975, signed by Luna, Casillas and Aguilar in their capacities as officers of Tejas, which purported to provide "the information required by SBA to surrender a MESBIC license." The letter clearly suggests its authors' recognition that the license could not be revoked unilaterally, as it provides the information required by SBA regulation for the surrender of a license, 13 CFR 107.105 (1975).[2] Finally, the State's witness from the SBA, Mr. Cyr, testified that the license was subsequently surrendered on November 7, 1975, and stated that the letter (State's Exhibit No. 10) was in compliance with a request by the SBA to Tejas as a condition required for surrender of a license. We conclude that the license was not surrendered

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2. 13 C.F.R. 107.105, "Surrender of License," provides:
"A license shall not be surrendered without SBA's prior written approval. Request for approval shall be accompanied by an offer of immediate payment of all monies owing to SBA, or by a plan satisfactory to SBA for the orderly liquidation thereof. Upon receipt of Licensee's request, SBA may remove Licensee's name from published lists of Licensees, and conduct an examination or investigation of its affairs pursuant to section 310 of the Act."

until November 7, 1975, and that 13 CFR 107.1004, supra, applied until then.

In the time between the September 26 meeting and the eventual license surrender, events occurred in furtherance of the mutual plan to channel funds from Tejas into the "holding company" (Perceptions, Inc.), and then to appellants' own businesses. On October 23, Perceptions was incorporated, and Amaya and Hernandez were installed as officers of it (while Casillas, Luna and Aguilar remained directors of Tejas, which effectively controlled Perceptions). On October 27 the first installment of capitalization, a check from Tejas for $50,000, was made to Perceptions. State's witness Gene Mendez testified that during the same period in October, he participated in at least two meetings attended by all five appellants where disposition of the Tejas/Perceptions capital was discussed. Types of business ventures for the individual appellants were discussed, as was a division of the available money into amounts of approximately $17,500 for each investment. Testimony by each appellant confirmed these discussions in October. On October 31, $17,000 was paid from Tejas (by a check signed by Luna and Casillas) to the Oak City Inn, a restaurant owned by Luna. On November 1, notes for $18,500 apiece were executed by Hernandez and Aguilar, in favor of Tejas, for loans for investment in a restaurant called La Copa de Leche which was incorporated on November 7, 1975. Finally, on November 7, a check for $34,000 was written from Perceptions (signed by Amaya and Hernandez) to La Copa de Leche.

After November 7, the arrangement continued, with another $56,000 loaned by Tejas to Perceptions on No-

vember 20. Loans to the appellants continued: Taco Village, a restaurant owned by Amaya and Casillas, received $37,000 from Perceptions beginning November 19; and Oak City Inn received $18,500 from Perceptions on November 24. On January 7, 1976, the Tejas shareholders met and decided that Perceptions was not working out as anticipated and should be abandoned.

The evidence thus shows that sometime between September 26, 1975 and November 7, 1975, appellants agreed to set up a corporation, capitalize it with funds from Tejas, and divide up the funds approximately equally among themselves in the form of loans to businesses they would own. Prior to November 7, the SBA conflicts of interest regulation was in force and prohibited the course of conduct engaged in by appellants.[3] Having reviewed the evidence under the standard of *Jackson v. Virginia*, supra, we find that a rational trier of fact could have found a misapplication beyond a reasonable doubt.

B. Substantial Risk of Loss

Appellant Aguilar adopts the above argument, and adds a challenge to the sufficiency of the evidence to

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3. We note the collateral issue raised in appellants' brief, whether the SBA regulation is a "law" within the meaning of § 32.45, supra. "Law" is defined in V.T.C.A. Penal Code, § 1.07(20) to include "a rule authorized by and lawfully adopted under a statute." (The trial court's instructions to the jury included this definition from the Penal Code.) The regulations codified at 13 CFR 107 *et seq.* are rules authorized by Congress and lawfully promulgated by the SBA. See 15 U.S.C.A. § 687(c) (West 1976). In addition, when this Court reaffirmed its judicial notice of the laws of the United States in Plaster v. State, 567 S.W.2d 500 (Tex. Cr. App. 1978), it specifically noticed two sections in Title 41 of the Code of Federal Regulations. We conclude from both § 1.07(20) and *Plaster*, supra, that 13 CFR 107.1004 is a law within the meaning of Art. 32.45, supra.

show a "substantial risk of loss" under V.T.C.A. Penal Code, § 32.45(b), supra. He argues that loans made by Tejas were inherently risky because they were intended as seed money for minority business enterprises, relaxed standards were used by the loan committee in approving such loans, and the loans were often unsecured. Compared to the typical Tejas loan, Aguilar maintains, those to the appellants did not involve a substantial risk of loss because all of the appellants had good credit ratings, had done business with the bank where Tejas had its account, were considered honest, and agreed to invest their personal money in their businesses along with the Tejas funds. Aguilar also argues that each appellant's venture was examined by the group to determine its feasibility to merit a loan and that the loans were evidenced by written notes. Finally, Aguilar notes the testimony at trial that banks and corporations "often" lend money to their own directors. He concludes that the State's evidence that the loans were unsecured and self-enforced is insufficient to show a substantial risk of loss.

The phrase "substantial risk of loss" is not defined in the Penal Code, was not defined in the trial court's charge to the jury, is not discussed in the State's brief to this Court, and is not addressed by any decisions of this Court.[4] The Amarillo Court of Appeals recently dis-

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4. This Court has only discussed Art. 32.45, supra in one reported case, Coplin v. State, 585 S.W.2d 734 (Tex. Cr. App. 1979), which involved the scope of the definition of fiduciaries in the statute and in the jury charge. There are only five other cases reported under Art. 32.45. See *Bynum*, supra; Little v. State, 699 S.W.2d 316 (Tex. App.—San Antonio 1985, no pet.); Showery v. State, 678 S.W.2d 103 (Tex. App.—El Paso 1984, pet. ref'd); Luffred v. State, 642 S.W.2d 242 (Tex. App.—Houston [14th Dist.] 1982, no pet.); Boyette v. State, 632 S.W.2d 915 (Tex. App.—Houston [14th Dist.] 1982, pet ref'd).

cussed the phrase in Bynum v. State, ____S.W.2d____ (Tex. App. No. 07-84-0220-CR, April 30, 1986, no pet.), where the defendant argued insufficiency of the evidence to prove, *inter alia,* a substantial risk of loss. The court applied the "cardinal rule" of statutory construction that when words are not defined in a statute, the words "employed are ordinarily given their plain meaning, without regard to the distinction usually made between the construction of penal laws and laws on other subjects, unless the act clearly shows that they were used in some other sense." *Id.*, slip op. p. 4, citing Campos v. State, 623 S.W.2d 657, 658 (Tex. Cr. App. 1981). Applying that principle, the court noted the dictionary definition of "substantial" as constituting substance; or not seeming or imaginary; or not illusive, but real and true," and the definition of "risk" as "the possibility of loss, injury, disadvantage, or destruction." *Bynum,* supra at slip op. p. 4, citing Webster's Third New International Dictionary (1976). The court concluded from the facts of that case that the jury was entitled to conclude that the defendant's handling of the funds in question created a "real possibility of loss." *Bynum,* supra at slip op. p. 7.

For further guidance on the meaning of "substantial risk of loss," we turn to the provision of the Model Penal Code that is cited in the Historical Note, Comparative Laws portion of V.T.C.A. Penal Code, § 32.45 (Vernon's 1974). See Model Penal Code and Commentaries, § 224.13 (ALI 1980).[5] In Footnote 8 to the Comment

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5. Sec. 224.13, Misapplication of Entrusted Property and Property of Government or Financial Institution, reads in pertinent part: "A person commits an offense if he applies or disposes of property that has been entrusted to him as a fiduciary, or property of the government or of a financial institution, in a manner which he knows is unlawful and involves *substantial risk of*

on § 224.13, the meaning of "substantial risk of loss" is clarified by comparing it to one of the definitions for "deprive" from the Definitions for Theft and Related Offenses:

> "Section 223.0(1) defines 'deprive' to include situations where the actor disposes of property 'so as to make it unlikely that the owner will recover it.' The operation of this definition will sometimes make it a close question whether conduct by a fiduciary is a theft under Section 223.2 [Consolidated Theft] or a violation of Section 224.13 [Misapplication]. The difference between the two offenses inheres in the degree of risk of loss involved. If it is 'unlikely' that recovery of property will occur, by which is meant a substantial certainty, then the offense might be theft. If there is a 'substantial risk,' i.e., less certainty of a loss, then the offense might be a misapplication. The line is a subtle one but there can be no escape from having to draw it. . . ."

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loss or detriment to the owner of the property or to a person for whose benefit the property was entrusted." (Emphasis added.)

The Background discussion of the offense notes that its essence is a knowing violation of the restrictions or regulations governing the handling of property, and that no purpose to appropriate the property for the benefit of the actor or another nor any purpose to deprive the owners or lawful beneficiaries of their property need be proved. See also, Practice Commentary to V.T.C.A. Penal Code, § 32.45 (Vernon's 1974). The absence of such purposes is what distinguishes misapplication from forms of theft that are treated under the consolidated theft provisions in § 223.2 of the Model Code, which corresponds to V.T.C.A. Penal Code, § 31.03. This distinction in degree of acquisitiveness prompts the Model Code authors to recommend only misdemeanor status at worst for the offense; they note that Texas is one of the few states that grades the offense as a felony if the property involved exceeds a certain amount. They also note that there is "at least one" jurisdiction (Texas) that allows conviction based merely on a *mens rea* of recklessness for all elements of the crime, including the risk of loss. See Model Penal Code, supra, pp. 358-9, 363. We conclude that Texas is comparatively "tough" on misapplication offenses.

The applicability of this comparison for our purposes is demonstrated by our own Penal Code's inclusion of a virtually identical definition of "deprive," for theft purposes, in V.T.C.A. Penal Code, § 31.01(3)(C): "to dispose of property in a manner that makes recovery of the property by the owner unlikely."

The *Bynum*, supra, discussion of substantial risk of loss comports with that of the Model Code: a "real possibility" of loss is one, we believe, that exists but does not rise to the level of a substantial certainty. It need not have to be "unlikely" that the property will be recovered, but the risk of loss does have to be a positive possibility; we conclude that the risk must be, at least, more likely than not. With this refinement of the issue (as well as the *Jackson v. Virginia* standard) in mind, we review the evidence of substantial risk of loss.

At the outset, we note that the State's brief to this Court wholly fails to address appellant's challenge to the sufficiency of the evidence to show substantial risk of loss. At trial, however, the essence of the State's case for risk of loss was the self-enforced nature of the loans. This issue was most forcefully presented when Luna's grand jury testimony was read to the jury:

> "Q. [BY PROSECUTOR] Now, your check was from Perception?
>
> A. Correct.
>
> Q. So, you owe Perception, Incorporated, which is a total separate entity from Tejas.
>
> A. Correct.
>
> . . .

Q. Who will deposit that check when you write it in October, and who will you make it payable to?

A. I'll probably make it payable to Tejas because Perception is not around any more.

Q. Okay, so if nobody is left in Perception to take the money, then it's up to Tejas to collect the money?

A. (Nodding head affirmatively)

Q. Who, Aguilar?

A. Aguilar, Casillas and Luna.

Q. So, if you don't pay, they'll have to file suit on you?

A. Correct.

Q. If they don't pay, you'll have to file suit on them?

A. Correct.

Q. And if all of you don't pay and don't file suit on each other, everybody just goes on their way without ever repaying the money?

A. I doubt it.

Q. But it could be true?

A. Yes."

The jury also heard testimony in response to hypothetical questions posed to State's witness McClain, an Austin banker who served on the Tejas loan committee. McClain found a substantial risk of loss in response to hypotheticals posed by the State, and described the two factors that formed the basis of his analysis: the self-enforced nature of the loans and the lack of safe-keeping of the note instruments themselves. (The State's hypotheticals included statements about the notes not being kept in a safe place; see discussion below.) On cross-

examination, he stated that the other factors presented by the defense, such as putting their own money into the ventures, the purpose of the enterprise, or the credit rating of the debtor, would not even enter into his consideration until both of the above elements were resolved. Finally, McClain explained on cross-examination that loans by banks to their own directors were very closely regulated with special rules by state and federal examining authorities, that auditors frown heavily on the practice and request additional information to analyze it, and that all this special consideration for the practice is precisely because of the risk of loss involved.

The State also presented witness Yeakel, an Austin corporate attorney who also served on the Tejas loan committee, and who testified as to the liability of corporate directors who vote for or assent to loans to themselves or other directors. (See Tex. Bus. Corp. Act § 2.41 A, discussed supra, Footnote 1.) Yeakel testified that the practice of directors making loans to themselves is never proper in his opinion, and that he always advises clients against it. He responded to a State's hypothetical, similar to those presented to McClain, with the opinion that a substantial risk of loss was involved.

The defense presented witness Hayes, an Austin banker who had had numerous dealings with all the defendants and testified as to their good credit ratings and honesty, as argued by Aguilar. Contrary to Aguilar's characterization of his testimony, however, Hayes did not say that banks and corporations "often" loan money to their directors. He stated, in response to the question of whether loaning money to directors was not unusual, merely that the practice was "not unusual."

Aguilar also argues that "the loans were evidenced by written notes," and notes that McClain's responses to the hypothetical questions were qualified when the defense stipulated that there were written notes, safely kept. Clearly, the presence or absence of written evidence of the debt, securely kept, was important to McClain's opinion. In fact, the jury was told of the appellants' intention to use written notes, but was initially presented only with the two notes executed by Hernandez. Aguilar's two notes did not surface until he testified in his own defense at trial, saying that he found them in the files of his restaurant. Other appellants' testimony indicated that their notes were lost in the files of Tejas when Tejas was moved out of its rented office space. The impression left by our review of the record is that the self-enforced nature of the loans was reinforced by a system of storing the written evidence of the debts that was subject only to the control of the appellants: money was borrowed from Tejas (or Perceptions, controlled by Tejas), notes were executed to Tejas (or Perceptions, depending on when executed), and the notes were kept either by the debtor himself or by Tejas, controlled by Casillas, Luna and Aguilar.

Aguilar further maintains that the defense demonstrated the inherent risk in minority-enterprise lending. This was amply achieved through testimony about the relaxed criteria Tejas used, compared with a bank or even a non-minority SBA loan. Appellants are in the awkward position of arguing, on one hand, that they are minorities and therefore appropriate recipients of Tejas' seed money (since they never denied lending it to themselves), and on the other hand, that the risk of lending money to them was not high, as it was for the typical Tejas loan. They

appear to feel that lending the money to themselves was a good deal for everyone concerned, including Tejas.

Returning to Aguilar's contentions, our review of the record confirms the riskiness of the typical Tejas loan, that the appellants were considered honest and good credit risks, that they jointly reviewed their proposals for feasibility, and that they agreed to invest their personal money in the ventures to insure maximum incentive. Appellants clearly went about their business in a professional, risk-averse manner, and were not launching into enterprises with the intention to fail.[6]

Without gainsaying the evidence that leads to that conclusion, we are left with the State's case of unsecured, self-enforced debts, which appellants did not successfully counter. Considering the evidence in the light most favorable to the verdict, we conclude that a rational juror could have found a substantial risk of loss beyond a reasonable doubt.

In conclusion on the first ground of error, we find that the evidence is sufficient to support the convictions of appellants Casillas, Aguilar and Luna. The decision of the Court of Appeals is affirmed on ground of error no. 1.

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6. Cf. United States v. Levy, 741 F.2d 915, 922 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 440, a prosecution for willful misapplication of bank funds under 18 U.S.C. § 657:

> "A rational trier of fact could find based on this evidence that appellant had a deliberate plan to channel substantial sums from the Association to his use and to the use of his company. Even though appellant may have only wanted to borrow the funds and may have had the best of intentions to repay the Association, appellant exposed the Association's funds to a substantial risk of loss. The natural tendency of diverting and spending funds destined for the Association was to harm the Association."

III. LIMITING INSTRUCTION

Review was also granted to consider the ground of error raised by Casillas and Luna (as well as Hernandez) that the Court of Appeals erred in holding that the trial court properly refused to give a limiting instruction to the jury concerning the admissibility of co-conspirators' hearsay. At trial, lengthy segments of all five appellants' grand jury testimony was read before the jury, as we have mentioned in our discussion above. After testimony by Amaya and Hernandez was read, the State began to read Aguilar's testimony when the defense objected on the grounds that the loan transactions being discussed were extraneous offenses subject to a motion in limine. The trial court excused the jury, the defense argued that the jury should be instructed to disregard the testimony as to all defendants but Aguilar, and the State argued that all five defendants worked together as a common conspiracy so that the evidence would be admissible against all. The court agreed:

> "THE COURT: That will be the ruling of the Court. Even though the defendants are not charged as co-conspirators, under the substantive law that the law of evidence relates to the people who act together is called also a conspiracy rule, and the acts and declarations of one coconspirator is [sic] admissible against the others, even though they were not present when it occurred.
>
> MR. WEIR: [Counsel for Casillas, Luna, Aguilar and Amaya] Then, the Court is not going to instruct the jury on that after it's read to disregard that?
>
> THE COURT: No, sir, I will not at this time. You might re-urge it at the time I prepare the charge,

> because I might have a broader view or more in depth view of what we have done. But at this time I'll deny it."

At the close of evidence, the court denied appellants' special requested jury instructions defining conspiracy and seeking to limit the use of co-conspirators' testimony, citing Lewis v. State, 237 S.W.2d 293 (Tex. Cr. App. 1951) (On Motion for Rehearing). The court made no instructions of its own limiting the use of co-conspirators' hearsay.

The Court of Appeals addressed this issue briefly, stating:

> "Although there are numerous cases regarding such a charge, it seems that a charge is not necessary. This Court is in agreement with Professor Ray that whether a conspiracy existed so as to allow admission of testimony of a co-conspirator is a question of law for the Court to determine. 1 Ray, Law of Evidence § 2 (1980). Because the task of determining the existence of a conspiracy is one for the court, no instruction was needed. *See also* Massie v. Hutcheson, 296 S.W.2d 939 (Tex. Civ. App. 1927, writ ref'd). The ground of error is overruled." *Casillas*, supra at slip op. p. 10-11.

We agree with appellants that this pays rather short shrift to the issue, but we affirm the Court of Appeals for the reasons developed below. Briefly, we agree with the State that all of the appellants' own testimony was sufficient to authorize their convictions. In addition, our conclusion comports with the implementation of the new Texas Rules of Criminal Evidence, specifically Rule 104.

Before turning to the rules, however, we discuss the applicability of *Lewis,* supra, cited by the trial court and discussed at length in briefs to this Court.

Upon denying appellant's requested charges on conspiracy, the tral court paraphrased *Lewis,* supra at 301, by writing the following on the proposed charge:

> "See motion for rehearing in *Lewis* [supra], where it is stated that where a defendant is shown to be guilty by his own acts and declarations and not those of his co-principals (co-parties) a charge on the acts and declarations of co-conspirators is *not* required."

Lewis was an illegal gaming case where the defendant was convicted as a principal for being the doorman to the gaming room. He complained on appeal about the conspiracy charge that was submitted to the jury, claiming that it allowed the jury to rule on evidence that was not in dispute. This Court held that the charge did not constitute error because, under the facts, the defendant's own acts and declarations sufficiently connected him with the offense to authorize a jury to convict him, and because no declarations or acts of his co-principals connected him. *Id.* at 301. Appellants rely on the latter distinction to argue that *Lewis* is distinguishable from the case at bar, where the hearsay testimony was extensive and related to the heart of the State's case connecting Luna and Casillas to the offense. Appellants also make a distinction based on the following language in *Lewis,* supra at 301:

> "We predicate our holding in this case on the proposition that appellant was present as that term has been defined by this court, during the entire transaction and therefore the question of acts and declara-

> tions of his co-principals in his absence passes out of the case."

Appellants argue that, unlike the testimony admitted in the case at bar, the testimony in *Lewis* was not hearsay since the defendant was present at the time.

The State relies on the same passage from *Lewis,* supra, to argue that the case indeed turned on the fact of the defendant's presence throughout the transaction. Therefore, any problem of linking the defendant to the crime through the acts or declarations of other parties to the offense (done or said in the defendant's absence) is irrelevant. We agree. This Court pointed out twice in the paragraph preceding that quoted above that the defendant's own acts and declarations showed that he was sufficiently connected with the commission of the felony to authorize a jury to convict him. *Id.* The limiting instruction given in the *Lewis* case, over the defendant's objection, was harmless and arguably to the defendant's benefit.[7] This conclusion comports with the principle that where evidence which otherwise would be inadmissible

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7. The State notes a distinction between *Lewis* and the instant case which is ironic: Lewis wanted the trial court to exclude the instruction which appellants sought. The charge admonished the jury not to consider any declarations by co-principals, made outside the defendant's presence, *if any,* unless the jury found beyond a reasonable doubt that a conspiracy existed between the declarant and the defendant. Lewis thus argued that because uncontroverted evidence showed the declarations were made outside his presence (he was on a staircase guarding the door), the court's charge requiring the jury to resolve whether or not there was such evidence amounted to a comment on the weight of the evidence. This Court did not reach the novel question, holding instead that the defendant was constructively present when the declarations were made. In the instant case, appellants sought a charge which, in view of the extensive evidence of a conspiracy (much of which they supplied themselves), was arguably a comment on the weight of undisputed facts.

is proven by some other testimony, no reversible error is shown. See Mutscher v. State, 514 S.W.2d 905, 922 (Tex. Cr. App. 1974).

We agree with the State that appellants advance no valid justification for the charge in their case, where each of the hearsay declarants was at trial, took the stand, and testified to virtually the same decision to lend money to themselves as adduced by reading the grand jury testimony. The defensive theory appears to have been that the State could not show a misapplication even with in-trial admissions of the transactions in question. Reliance on that theory was misplaced, because it seems to have assumed that the SBA conflicts of interest regulation was inapplicable. Appellants' assumption that their unilateral revocation of the SBA license on September 26, 1975, freed them to engage in self-lending was erroneous, as we hold above.

In addition, the same result is indicated by the Texas Rule of Criminal Evidence 104(a), (effective September 1, 1986) which states:

> "Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges."

In United States v. James, 590 F.2d 575 (5th Cir. 1979), the Fifth Circuit interpreted for the first time the effect of Federal Rule of Evidence 104(a) on their practice. Prior to the rule, the procedure for admission of

out-of-court statements by alleged co-conspirators was like Texas practice, sharing the responsibility between judge and jury. First, the judge made a preliminary determination to whether the alleged conspiracy existed and that the declarant and defendant were members. Then the jury was instructed that it could consider the evidence against a particular defendant only if it first determined that the conspiracy existed, that the declarant and defendant were members of it, and that the statement was made during the course and in furtherance of the conspiracy. *Id.* at 578.

Rule 104 changed that practice, requiring that the judge alone make the determination of the admissibility of the evidence. The policy behind this conclusion stems from the danger that a jury might convict on the basis of co-conspirator statements without first dealing with the admissibility question. The jury's function, under Rule 104(b), "Relevancy conditioned on fact,"[8] is to address preliminary questions which present no such danger of prejudice to the defendant. *Id.* at 579-80.

We have adopted our new Rules of Criminal Evidence with identical language in Rule 104 as the Federal Rules (and the Texas Civil Rules). We agree with the reasoning in *James* supra, regarding the functions of judge and jury under the rule[9] and hold that the same result is indicated under Texas Criminal Rule of Evidence 104.

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8. Rule 104(b) states: "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."

9. We specifically do not reach the other issues discussed in *James,* and reserve them for discussion when they are raised. See *James,* supra at 584-594 (Tjoflat, J., specially concurring).

We thus overrule appellants' second ground of error. The decision of the Court of Appeals is affirmed as to appellants Casillas, Luna and Aguilar.

Milier, Judge

Delivered: July 2, 1986

En Banc

Publish

Onion, P.J., not participating.

Teague, J., dissents.

APPENDIX B

IN THE COURT OF APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN

NO. 3-82-216-CR(T)
NO. 3-82-217-CR(T)
NO. 3-82-218-CR(T)
NO. 3-82-219-CR(T)
NO. 3-82-220-CR(T)

ARTURO CASILLAS,
JOSE AGUILAR,
ROBERT AMAYA,
OMERO LUNA,
FERNANDO HERNANDEZ,
Appellants

v.

THE STATE OF TEXAS,
Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 167TH JUDICIAL DISTRICT
NO. 53,081, HONORABLE TOM BLACKWELL, JUDGE

Arturo Casillas, Jose Aguilar, Robert Amaya, Omero Luna, and Fernando Hernandez appeal from judgments of conviction for misapplication of fiduciary property ren-

dered after a jury trial in the district court of Travis County. Tex. Pen. Code Ann. § 32.45 (1974). The jury assessed Amaya's punishment at ten years confinement and a $10,000 fine. The other four appellants each received from the jury punishment of confinement for a period of twelve years and one day and a $10,000 fine. All appellants were tried jointly, their appeals were jointly submitted on oral argument, and all such appeals will be treated in this opinion. This Court will affirm the judgments of conviction.

In 1973, the Mexican American Council for Economic Progress (MACEP), a non-profit corporation, received a $419,000 grant from the United States Department of Labor (DOL). The grant was based upon a proposal submitted by appellant Casillas and Harmon Lisnow, an early organizer of MACEP. Of the $419,000, the sum of $155,000 was earmarked to fund a small business investment corporation (MESBIC) which would operate under the regulations of the Small Business Administration (SBA) toward the goal of lending money to minority persons to start businesses. The MESBIC was entitled Tejas Investment Corporation (Tejas), and was funded with the $155,000 from the DOL and $150,000 from private sources, the matching funds being a requirement for licensing by the SBA. Appellants Casillas, Aguilar and Luna served on the board of directors of MACEP during this time, while appellant Amaya worked for an organization related to MACEP. Appellant Hernandez was MACEP's bookkeeper.

In September of 1975, all appellants were serving on the board of Tejas when one of the private investors decided to withdraw its funds from Tejas. This decision

precipitated a determination by the board of Tejas to surrender its MESBIC license and reorganize Tejas into a private investment corporation, which retained the name Tejas. Appellants then formed yet another corporation, Perceptions, Inc., into which appellants transferred $106,000 of Tejas' funds. Perceptions, Inc., in turn, lent this sum to the individual appellants who started their own businesses. The loans to appellants were unsecured.

Appellants attack the judgments of conviction by numerous grounds of error. Appellants Amaya, Hernandez, Casillas, and Luna level identical grounds of error. Appellant Aguilar, however, asserts separate grounds of error.

All appellants complain, in five different respects, that the evidence is insufficient to support the conviction, and that § 32.45 is unconstitutionally vague.

Section 32.45(b) provides:

> [a] person commits an offense if he intentionally, knowingly, or recklessly misapplies property he holds as a fiduciary or property of a financial institution in a manner that involves a substantial risk of loss to the owner of the property or to a person for whose benefit the property is held.

"Misapply" is defined as dealing with property either contrary to an agreement under which the fiduciary holds the property, or contrary to a law prescribing the custody or disposition of the property.

In determining the sufficiency of the evidence to support a criminal conviction, the question is whether, after viewing the evidence in the light most favorable to the

prosecution, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1974); Carlsen v. State, 654 S.W.2d 444 (Tex. Cr. App. 1983) (opinion on State's motion for rehearing).

Appellants first claim the evidence is insufficient to show that the funds were dealt with contrary to an agreement or any applicable law. We do not agree. The original grant to MACEP, from which the Tejas funds were derived, included a restriction that, "[n]o loan, grant or extension of professional or personal services may be given to any entity in which any employee or board member of the grantee or any member of his family has any financial interest." Of these funds, $155,000 was allocated to Tejas, a corporation on which all five appellants served as board members at the time of its "reorganization." The "reorganization" included the agreement to form Perceptions, Inc., and to lend the money to appellants. The evidence is sufficient to show a misapplication of the funds.

Appellants next complain that the evidence is insufficient to show a substantial risk of loss, especially due to the fact that the funds earmarked for Tejas were intended to be loaned to high-risk recipients. Nevertheless, the evidence also shows that the loans to appellants were unsecured, and that they were self-enforced, i.e., if there were defaults appellants would be the only persons who could enforce collection of the loans. Surely, this evidence is sufficient to establish a substantial risk of loss.

Appellants argue further that the evidence is insufficient because the indictment alleges Tejas to be the owner of the funds, while the proof shows that the funds were lent to them from Perceptions, Inc., thereby creat-

ing a variance between the allegations and the proof. This contention is without merit. The proof shows that appellants had been put on notice of the conflict of interest provisions of the grant to MACEP. The steps of funneling the funds through a series of corporations does not change the fact that the funds were alloted originally for a MESBIC (Tejas), and that it was from that MESBIC that the funds were misapplied. The evidence is sufficient to show that Tejas was the owner of the funds.

In addition, appellants insist that the evidence is insufficient because the prosecution failed to prove that the funds which were transferred to Perceptions, Inc., from Tejas came from the $155,000 sum of government funds rather than from the matching private funds. Appellants argue, therefore, that the prosecution failed to prove that they applied the funds contrary to the provision in the DOL grant prohibiting self-dealing. This Court, however, is convinced that under the circumstance of commingled funds the jury could properly infer that a portion of the commingled funds had its origin in the DOL grant. Otherwise, the burden on the State to trace the government funds would be virtually impossible to discharge.

Appellants Amaya and Hernandez, only, claim the evidence is insufficient to show that they were fiduciaries, since they were not on Tejas' board at the time the funds were transferred to Perceptions, Inc. The proof, however, shows that Amaya and Hernandez were on the board at the time Tejas was "reorganized," and at the time the decision to form Perceptions and lend the money to themselves was made. Furthermore, both

Amaya and Hernandez were among Perceptions' officers at the time of the transfer of funds from Tejas to Perceptions. The district court charged on the law of parties, and in this respect, appellants Amaya and Hernandez aided the other appellants by serving as officers of Perceptions and by assisting in the furtherance of the misapplication. The evidence is sufficient to support the conviction.

The second ground of error asserted by all appellants is that § 32.45 is unconstitutionally vague in that the term "substantial risk of loss" does not put one on notice of what actions constitute a crime. Perhaps the best statement of the vagueness doctrine was set forth in Connally v. General Constr. Co., 269 U.S. 385, 391 (1926), in which the United States Supreme Court held:

> [t]hat the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

On the other hand, in Colten v. Kentucky, 407 U.S. 104 (1972), the Court examined the vagueness doctrine from a more pragmatic view:

> [t]he root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical diffi-

> culties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited.

In *Colten,* the court sustained the constitutionality of a Kentucky statute making one guilty of disorderly conduct if "with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof" he refuses to comply with a lawful order of the police to disperse. In sustaining the statute, the Supreme Court stated that it agreed with the Kentucky court holding that "[w]e believe that citizens who desire to obey the statute will have no difficulty in understanding it." This Court is convinced that § 32.45 is sufficiently definite to give notice of the character of conduct proscribed.

Appellant Aguilar complains of error by seven grounds of error. First, Aguilar complains that he was denied effective assistance of counsel because of a conflict of interest brought about by a single attorney representing four of the appellants at the trial of this cause. Only appellant Hernandez had separate counsel at trial.

Aguilar voiced no complaint at trial regarding a conflict of interest. In such case, an accused must show an actual conflict of interest which adversely affected his attorney's performance. The mere showing of a possible conflict is not sufficient. Cuyler v. Sullivan, 444 U.S. 823 (1980). A significant conflict of interest exists where one defendant stands to gain significantly by counsel adducing probative evidence or advancing plausible argument damaging to a co-defendant. Ferguson v. State, 639 S.W.2d 307 (Tex. Cr. App. 1982). Once a defendant shows that a conflict actually affected his representation,

he need not demonstrate any specific prejudice to obtain relief. Ex parte Parham, 611 S.W.2d 103 (Tex. Cr. App. 1981). The sole fact, however, that two defendants were represented by the same retained counsel does not show that one of them was denied effective assistance of counsel. Ortiz v. State, 577 S.W.2d 246 (Tex. Cr. App. 1979).

In the present appeal, Aguilar sets out only one specific instance, other than a mere showing of a possible conflict, of an alleged conflict of interest. He relies upon the following excerpt from trial counsel's closing argument:

> [t]he point is in Mr. Amaya's case that he had no relationship to Tejas. He had no responsibility . . . and he's in the case, I frankly have to say I still don't understand. We have Mr. Amaya coming in just by accident.

Aguilar then refers to the State's closing argument in which the prosecutor admits that Amaya might not be as culpable as the others, and that he would not argue with members of the jury if they made Amaya's sentence shorter than the others.

The opinions which we have seen in which judgments of conviction have been reversed concern those situations in which trial counsel has either introduced evidence or failed to tender evidence that is exculpatory to one defendant, yet inculpatory to the other. Ex parte Parham, *supra;* Gonzales v. State, 605 S.W.2d 278 (Tex. Cr. App. 1980); Alaniz v. State, 583 S.W.2d 380 (Tex. Cr. App. 1979). Aguilar's complaint does not fit these cases. Furthermore, the prosecution's argument, while attempting to exculpate Amaya, was in no way inculpative of appellant Aguilar. The ground of error is overruled.

Aguilar's third ground of error is that the district court erred in authorizing a conviction under a theory not alleged in the indictment. The indictment alleged that Aguilar misapplied the funds "in a manner that involved a substantial risk of loss to the Tejas Investment Corporation. . . ." In the abstract portion of the charge to the jury, the district court tracked the language of § 32.45, which also makes it a crime to misapply fiduciary funds in a manner that involves a substantial risk of loss to "a person for whose benefit the property is held." In applying the law to the facts, however, the district court limited the instruction to a misapplication of funds in "a manner that involved a substantial risk of loss to [Tejas]. . . ." Statements of law in the abstract portion of the charge which enlarge upon the allegations in the indictment do not constitute reversible error wherein the district court's application of the law to the facts effectively restricts the jury's deliberations to the allegations in the indictment. Grady v. State, 614 S.W.2d 830 (Tex. Cr. App. 1981); Sandig v. State, 580 S.W.2d 584 (Tex. Cr. App. 1979). The ground of error is overruled.

By his fourth ground of error, Aguilar complains of the district court's failure to quash the indictment, which he claims does not show that the offense was committed within the county in which the indictment was returned. The indictment alleged that Aguilar "on or about the 1st day of November A.D. 1975, and before the presentment of this indictment, in the County of Travis, and State of Texas, did intentionally misapply property. . . ." Aguilar claims that without the words "then and there" coming after "did" and before "intentionally," the indictment fails to allege that the offense occurred in Travis County.

Indictments invariably contain the words "then and there," and in our search we have discovered none that do not contain these words. Regardless, the wording of the present indictment most certainly puts anyone on notice that the offense was alleged to have been committed in Travis County. The ground of error is overruled.

By his sixth ground of error, Aguilar argues that the district court erred in admitting into evidence a letter addressed to the board of directors of Tejas concerning conflict of interest. Aguilar contends that the letter was hearsay, and that no proper predicate was laid because it was not shown that Aguilar had read the letter. As to the hearsay contention, the evidence was admissible not to prove the truth of the contents of the letter, but instead to show that Aguilar had knowledge of what constituted a conflict of interest. There was no error in admitting the letters. As to the failure to lay the proper predicate, any error would be harmless in view of the fact that other probative evidence was admitted showing that Aguilar had been informed of possible conflicts of interest. *See* Brasfield v. State, 600 S.W.2d 288 (Tex. Cr. App. 1980). The ground of error is overruled.

Appellants Casillas and Luna assert ten grounds of error. They argue that the district court erred in admitting into evidence the grand jury testimony of all five appellants, as it constituted hearsay. Appellants complain that such testimony was prejudicial in that in some respects it was cumulative of other testimony, thereby lending undue credence to that evidence; and that in other respects it conflicted with other testimony, thereby

lessening that testimony's weight with the jury. Appellants do not argue that, absent the grand jury testimony, the evidence is insufficient to support the conviction.

Appellants contend that error was preserved with a "running" objection obtained at page 234 of the statement of facts regarding a conversation as to the source of the funds in question. Appellants apparently are under the impression that their "running objection" extended to every piece of hearsay admitted at trial, or at least to the hearsay complained of here admitted without objection at page 322 of the statement of facts. An objection should be made to the tender of evidence as soon as the ground of the objection is apparent or the objection is waived. 1 Ray, Law of Evidence § 24 (3rd ed. 1980). A "running objection" asserted much earlier in the trial to the offer of testimony from a different witness and involving different subject matter is not sufficient to preserve error.

We recognize, of course, that hearsay evidence, even when no objection is made to its admission, is without probative value. Bonds v. State, 573 S.W.2d 528 (Tex. Cr. App. 1978). Nevertheless, when the complaint on appeal concerns error in the admission of hearsay, other than the ground of sufficiency of evidence, it is necessary to preserve error by proper objection. *See* Patton v. State, 617 S.W.2d 255 (Tex. Cr. App. 1981). Therefore, appellants have raised no objection to the admission of this evidence, and nothing is preserved for review. *Id.*

Appellants' third ground of error is that the district court erred in not submitting to the jury two requested charges concerning conspiracy and the co-conspirator exception to the hearsay rule. Although there are numer-

ous cases regarding such a charge, it seems that a charge is not necessary. This Court is in agreement with Professor Ray that whether a conspiracy existed so as to allow admission of testimony of a co-conspirator is a question of law for the Court to determine. 1 Ray, Law of Evidence § 2 (1980). Because the task of determining the existence of a conspiracy is one for the court, no instruction was needed. *See also* Massie v. Hutcheson, 296 S.W. 939 (Tex. Civ. App. 1927, writ ref'd). The ground of error is overruled.

Appellants' fifth ground of error complains that the district court erred in not giving a limiting instruction regarding the grand jury testimony restricting it to impeachment purposes only. This Court has been unable to locate a request by counsel for such instructions. Therefore, nothing is presented for review.

Appellants' seventh ground of error complains that the district court erred in admitting evidence that the funds in Tejas came from government sources, intended for migrants. Appellants contend that this evidence was irrelevant and highly prejudicial. This contention is without merit. The relevancy of this evidence was to show the agreement between the government and MACEP, which included the prohibition against self-dealing. This evidence was an essential element of the State's case, and was therefore admissible.

Appellants' eighth ground of error is that the district court erred in not admitting into evidence the financial statements of appellants. The State objected on the grounds that the financial statements were dated *after* the loans were made, and thus were not relevant to appellants' financial status at the time the loans were

made. The State's argument is valid as to appellant Casillas. However, appellant Luna's financial statement was dated approximately a month before the date the loans were made. This financial statement would have been relevant to the issue of whether the loan to Luna involved a substantial risk of loss. Nevertheless, the district court instructed the jury on the law of parties, and Luna was charged not only with misapplying funds to himself, but also to the other four defendants. As a result, the error in not admitting Luna's financial statement was harmless beyond a reasonable doubt. *See*, Clark v. State, 627 S.W.2d 693 (Tex. Cr. App. 1982).

Appellants' ninth ground of error is that § 32.45 is unconstitutional as applied to them because pursuant to the grant under which they were operating, they were required by federal statute to lend money to high-risk applicants, thus forcing them to violate the Texas statute. This contention is also without merit. Appellants seem to ignore the fact that § 32.45 not only requires the element of a substantial risk of loss, but also a misapplication, i.e., the dealing with funds contrary to an agreement. Misapplication, of course, is not required by the federal program of lending money to high-risk applicants. Appellants were not forced to violate § 32.45. The ground of error is overruled.

Appellants Amaya and Hernandez level thirteen grounds of error, some of which are the same or similar to those already discussed and overruled. Appellants' sixth ground of error is that the district court erred in admitting hearsay statements of co-conspirators at a time when the evidence had yet to establish the existence of a conspiracy. There is nothing to this contention. Hearsay

statements of co-conspirators are admissible before the existence of a conspiracy has been established. Morgan v. State, 346 S.W.2d 116 (Tex. Cr. App. 1961).

Ground of error eight applies only to appellant Hernandez, who complains of the admission into evidence of an extraneous offense, perjury before the grand jury. The State cross-examined Hernandez regarding answers he made to the grand jury relating to whether he was ever a member of the board of directors or an officer of Perceptions, Inc. The State elicited from Hernandez that he told the grand jury he was not an officer and board member, when, in fact, he was. The State's response is that the grand jury testimony was a prior inconsistent statement to rebut Hernandez' testimony on direct examination that he was an officer and director. The State does not refer to the record where this testimony was elicited, and after an examination of Hernandez' direct examination, no such statement has been discovered. However, Hernandez, has failed to preserve error in this respect. Two objections were made during this line of questioning. The first was made after the State's attorney asked Hernandez if he concealed from the grand jury the fact that he was an officer and director of Perceptions, and after Hernandez had answered the question. In order to preserve error, an objection must be made at the first opportunity. Garcia v. State, 573 S.W.2d 12 (Tex. Cr. App. 1978). An objection made after an improper question has been answered is untimely. Rodriquez v. State, 577 S.W.2d 491 (Tex. Cr. App. 1979). The second objection made during this line of questioning was that the State's attorney's inquiry asking Hernandez if he committed aggravated perjury before the grand jury called for a conclusion. On appeal, Her-

nandez' ground of error is that extraneous offense was erroneously admitted into evidence. No error has been preserved. Bodiford v. State, 630 S.W.2d 847 (Tex. App. 1982, pet. ref'd). The ground of error is overruled.

Ground of error nine is that the district court erred in refusing to admit "evidence" of 42 U.S.C. § 2982d, which states that funds appropriated for programs such as the grant involved are not to be considered government funds. The "evidence" was proffered in rebuttal to statements made that the money was government money. There was no error in this regard since the fact that the source of the funds was the federal government was shown in order to prove the agreement prohibiting self-dealing. Therefore, the jury already knew the source of the funds. Regardless, evidence of 42 U.S.C. § 2982d was "admitted" without objection during the direct examination of appellant Hernandez.

Ground of error twelve is that the district court erred in allowing certain hypothetical questions to be answered. In these hypothetical questions, the state assumed that appellant Amaya was a member of the board of directors of Tejas at the time the loans were executed, when in fact the evidence showed that he was not, although he was an officer of Perceptions, Inc. at that time. Although a hypothetical question is required to be based on facts in evidence, Barefoot v. State, 592 S.W.2d 895 (Tex. Cr. App. 1980), any error in this regard was harmless beyond a reasonable doubt. In his brief, Amaya admits that the purpose of the questions was to establish the element of a substantial risk of loss, and the self-enforcement of the loans was a large part of establishing that element. Since the loans came from Perceptions, Inc., and not from Tejas, and Amaya was an officer of Perceptions at

the time the loans were made, making him responsible for their enforcement, the fact that the prosecutor also assumed Amaya was a member of the board of directors of Tejas was harmless beyond a reasonable doubt. *See* Clark v. State, *supra*.

By ground of error thirteen, appellants argue that the district court erred in sustaining three objections that were not made. In two of the three instances, objections were made, and there is no error in the district court's ruling on them. In the third instance, in which certain evidence was excluded, it does appear that the district court sustained an objection when no objection was made. However, nothing has been preserved for review. When evidence is allegedly excluded improperly, it is the duty of the party offering the evidence to show what it would have been; otherwise, he fails to preserve error. Ashley v. State, 362 S.W.2d 847 (Tex. Cr. App., 1962); Crawford v. State, 643 S.W.2d 178 (Tex. App. 1982). No bill of exception was perfected, therefore nothing is presented for review. The ground of error is overruled.

The judgments of conviction are affirmed.

Bob Shannon, Justice

[Before Justices Shannon, Smith and Brady]

Affirmed: Arturo Casillas
Jose Aguilar
Robert Amaya
Omero Luna
Fernando Hernandez

Filed: November 30, 1983

[Not Published]

APPENDIX C

NO. 304-84

ARTURO CASILLAS, et al,
Appellant

v.

THE STATE OF TEXAS,
Appellee

Appeal from TRAVIS County

O R D E R

Appellants Arturo Casillas, Jose Aguilar, Robert Amaya, Omero Luna and Fernando Hernandez appeal from their convictions for the offense of misapplication of fiduciary property, V.T.C.A. Penal Code, § 32.45. The Austin Court of Appeals affirmed in an unpublished opinion delivered November 30, 1983.

Appellants' Arturo Casillas, Omero Luna and Robert Amaya petitions for discretionary review are granted on the issue of the sufficiency of the evidence to sustain the convictions.

Appellants' Arturo Casillas, Omero Luna and Fernandez Hernandez petitions for discretionary review are granted as to the necessity of a limiting charge on the acts and declarations of coconspirators.

Oral argument, if timely requested, shall be limited to 30 minutes to be diveded as appellants' counsel may agree. The State is granted 30 minutes for oral arguments.

Appellants' Arturo Casillas, Robert Amaya, Omero Luna and Fernando Hernandez petitions for discretionary review are in all other respects refused.

Appellant Jose Aguilar's petition for discretionary review is refused.

IT IS SO ORDERED this 27th day of February, 1985.

PER CURIAM

EN BANC

DO NOT PUBLISH

NO. 3-82-216-CR(T)

IN THE
COURT OF CRIMINAL APPEALS

(Filed March 8, 1984)

ARTURO CASILLAS, JOSE AGUILAR, ROBERT AMAYA, OMERO LUNA & FERNANDO HERNANDEZ,
Appellants

MISAPPLICATION OF FIDUDICARY PROPERTY OVER $10,000

Casillas, Aguilar, Luna & Hernandez —
12 Years, 1 Day & $10,000 Fine

Amaya —
10 Years & $10,000 Fine

TRAVIS COUNTY.

MOTION FOR REHEARING OVERRULED: 1-11-84

Trial Court: 167th

Trial Court No.: 53081

Trial Judge: Tom Blackwell

Desposition: Affirmed

Date: 11-30-83

Disposition: Ct. of Ap. Aff. as to Casillas, Luna & Aguilar

Date: 7/2/86

Judge: Miller

#1 AMAYA

Appellant's Petition for Discretionary Review is Granted Per Order of February 27, 1985.

/s/ CLINTON, Judge

#2 HERNANDEZ

Appellant's Petition for Discretionary Review is Granted Per Order of February 27, 1985.

/s/ CLINTON, Judge

#3 AGUILAR

Appellant's Petition for Discretionary Review is Refused Per Order of February 27, 1985.

/s/ CLINTON, Judge

#4 CASILLAS-LUNA

Appellant's Petition for Discretionary Review is Granted Per Order of February 27, 1985.

/s/ CLINTON, Judge

PDR #3 AGUILAR

The Appellant's Motion for Rehearing on Petition for Discretionary Review is Denied July 8, 1987.

/s/ CLINTON, Judge

PDR #4 CASILLAS & LUNA

The Appellant's Motion for Rehearing on Petition for Discretionary Review is Denied July 8, 1987.

/s/ CLINTON, Judge

Teague, J., would grant.

PDR #1 & PDR #2

The State's (SPA) Motion for Rehearing on Petition for Discretionary Review is Denied July 8, 1987.

/s/ CLINTON, Judge

Teague, J., would grant.

PDR #1 AMAYA & PDR #2 HERNANDEZ

The State's Motion for Rehearing on Petition for Discretionary Review is Denied July 8, 1987.

/s/ CLINTON, Judge

Teague, J., would grant.

AGUILAR ONLY

The Appellant's Motion for Rehearing on Petition for Discretionary Review is Granted May 29, 1985.

/s/ CLINTON, Judge

Sufficiency of Evidence Consolidated with other Appellants.

PDR #4 CASILLAS & LUNA

The Appellant's Amended Motion for Rehearing on Petition for Discretionary Review is Denied July 8, 1987.

/s/ CLINTON, Judge

Teague, J., would grant.

APPENDIX D

NO. 304-84

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

ARTURO CASILLAS, ET AL,
Appellant

v.

THE STATE OF TEXAS,
Appellee

(Filed August 21, 1987)

APPELLANT ARTURO CASILLAS' NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

To The Honorable Judges Of The Court of Criminal Appeals:

Notice is hereby given that ARTURO CASILLAS, appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Criminal Appeals of Texas, affirming the decision of the Court of Appeals for the Third Supreme Judicial District of Texas at Austin and affirming the judgment of conviction, entered herein on July 2, 1986, and its final orders denying rehearing, entered herein on July 8, 1987.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

Respectfully submitted,

/s/ FRANCISCO G. MEDINA
Francisco G. Medina
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Bar No. 13894950

/s/ CHARLES HINTON
Mr. Charles Hinton
202 Travis, Suite 305
Houston, Texas
(713) 236-0770
Bar No. 09709800

NO. 304-84

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

OMERO P. LUNA, ET AL,
Appellant

v.

THE STATE OF TEXAS,
Appellee

(Filed August 21, 1987)

APPELLANT OMERO P. LUNA'S NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

To The Honorable Judges Of The Court of Criminal Appeals:

Notice is hereby given that OMERO P. LUNA, appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Criminal Appeals of Texas, affirming the decision of the Court of Appeals for the Third Supreme Judicial District of Texas at Austin and affirming the judgment of conviction, entered herein on July 2, 1986, and its final orders denying rehearing, entered herein on July 8, 1987.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

Respectfully submitted,

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/s/ CHARLES HINTON
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ATTORNEYS FOR
APPELLANT

PROOF OF SERVICE

1, Francisco G. Medina, a member of the bar of the Supreme Court of the United States and attorney for Appellant, pursuant to Rules 10.3, 28.3 and 28.5(b) of the Supreme Court of the United States, hereby certify that all parties required to be served with a copy of this Notice of Appeal have been served by mail by depositing a true and correct copy of the foregoing Notice of Appeal in a United States post office box with first-class postage prepaid, addressed to the following counsel of record at their following post office addresses on this the 20th day of August, 1987.

Hon. Ronald Earle
Travis County District Attorney
P. O. Box 1748
Austin, Texas 78767

Hon. Robert Huttash
Office of the State Prosecuting Attorney
P. O. Box 12405
Austin, Texas 78711

Honorable Jim Mattox
Attorney General of Texas
Supreme Court Building
Capitol Station
Austin, Texas 78711

Honorable Albert A. Pena, III
Attorney at Law
615 Waco
Corpus Christi, Texas 78401

Honorable Andrew J. Forsythe
804 United Bank Tower
Austin, Texas 78701

Honorable Ian B. Inglis
600 W. 9th Street
Austin, Texas 78701

/s/ FRANCISCO G. MEDINA
Francisco G. Medina

APPENDIX E-1

NO. 304-84

IN THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF TEXAS

ARTURO CASILLAS and OMERO LUNA,
Appellants

v.

THE STATE OF TEXAS
Appellee

PETITION FOR DISCRETIONARY REVIEW

To The Honorable Judges Of The Court of Criminal Appeals:

Now come Appellants, through counsel, and respectfully move that the Court grant review so that the issues they raise may be addressed by the Court:

STATEMENT OF THE CASE
(Deleted)

STATEMENT OF THE PROCEDURAL HISTORY OF THE CASE
(Deleted)

GROUNDS FOR REVIEW
(Nos. I through V Deleted)

VI.

THE COURT OF APPEALS ERRED IN HOLDING THAT THE PROSCRIPTION AGAINST LOANS INVOLVING A "SUBSTANTIAL RISK" CONTAINED IN § 32.45 OF THE TEXAS PENAL CODE WAS NOT UNCONSTITUTIONALLY VAGUE.

PRAYER
(Deleted)

Respectfully submitted:

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WEIR & ALVARADO
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San Antonio, Texas 78205

Mark Stevens
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401 W. Commerce, Suite 306
San Antonio, Texas 78207

GOLDSTEIN, GOLDSTEIN
& HILLEY
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By: _____
Gerald H. Goldstein
State Bar No. 08101000

Attorneys for Appellants

FILED IN

COURT OF CRIMINAL APPEALS
MARCH 8, 1984
Thomas Lowe, Clerk

APPENDIX E-2

NO. 0304-84

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

ARTURO CASILLAS and OMERO LUNA,
Appellants

v.

THE STATE OF TEXAS
Appellee

ON DISCRETIONARY REVIEW FROM
THE THIRD SUPREME JUDICIAL DISTRICT
OF THE STATE OF TEXAS

APPELLANTS' SECOND AMENDED MOTION
FOR REHEARING AND BRIEF IN
SUPPORT THEREOF

To The Honorable Court of Criminal Appeals:

COME NOW ARTURO CASILLAS and OMERO LUNA, Appellants herein, and submit this Second Amended Motion for Rehearing and Brief in Support Thereof, and would respectfully show unto the court the following:

STATEMENT OF GROUNDS FOR REHEARING

I. TEXAS COURTS HAVE NO JURISDICTION OF THE CRIME OF MISAPPLICATION OF FIDUCIARY PROPERTY BELONGING TO A SMALL BUSINESS INVESTMENT COMPANY, SUCH AS

TEJAS INVESTMENT CORPORATION, FOR THE REASON THAT SUCH CRIME IS DISTINCTLY AND SEPARATELY COVERED IN 18 U.S.C. § 657, AND CONGRESS, BY NECESSARY IMPLICATION, INTENDED THAT JURISDICTION OVER IT BE CONFERRED EXCLUSIVELY ON THE FEDERAL COURTS PURSUANT TO 18 U.S.C.§ 3231.

II. THIS COURT'S RULING ON APPELLANTS CASILLAS' AND LUNA'S SUFFICIENCY POINT WAS BASED UPON THE ERRONEOUS ASSUMPTION THAT APPELLANTS POSSESSED THE SPECIFIC INTENT REQUIRED OF THE FEDERAL COURTS FOR A CONVICTION BASED ON THE VIOLATION OF A FEDERAL REGULATION.

GROUND FOR REHEARING NUMBER ONE

I. TEXAS COURTS HAVE NO JURISDICTION OF THE CRIME OF MISAPPLICATION OF FIDUCIARY PROPERTY BELONGING TO A SMALL BUSINESS INVESTMENT COMPANY, SUCH AS TEJAS INVESTMENT CORPORATION, FOR THE REASON THAT SUCH CRIME IS DISTINCTLY AND SEPARATELY COVERED IN 18 U.S.C. § 657, AND CONGRESS, BY NECESSARY IMPLICATION, INTENDED THAT JURISDICTION OVER IT BE CONFERRED EXCLUSIVELY ON THE FEDERAL COURTS PURSUANT TO 18 U.S.C. § 3231.

ARGUMENT

CONCLUSION

PRAYER

(Deleted)

FILED IN

COURT OF CRIMINAL APPEALS
OCTOBER 8 1986
Thomas Lowe, Clerk

Respectfully submitted:

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By: _____
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ATTORNEYS FOR APPELLANTS,
ARTURO CASILLAS and
OMERO LUNA

APPENDIX E-3

NO. 0304-84

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

ARTURO CASILLAS and OMERO LUNA,
Appellants

v.

THE STATE OF TEXAS,
Appellee

ON DISCRETIONARY REVIEW FROM
THE THIRD SUPREME JUDICIAL DISTRICT
OF THE STATE OF TEXAS

APPELLANTS' MOTION FOR LEAVE TO SUPPLEMENT APPELLANTS' SECOND AMENDED MOTION FOR REHEARING, SUPPLEMENTAL MOTION, AND BRIEF IN SUPPORT OF SUPPLEMENTAL MOTION

To The Honorable Court of Criminal Appeals:

Comes now, ARTURO CASILLAS and OMERO LUNA, Appellants herein, pursuant to Rule 230, Texas R. App. Proc., to request leave to Supplement Appellants' Second Amended Motion for Rehearing. Appellants also submit their supplemental ground for rehearing and brief in support thereof, and would respectfully show unto the Court the following:

SUPPLEMENTAL GROUND FOR REHEARING

THIS COURT HAS NO JURISDICTION TO FIND THAT APPELLANTS VIOLATED THE CONFLICTS OF INTEREST REGULATION GOVERNING SBA LICENSEES, 13 C.F.R. § 107.1004 (1975), SINCE THE FEDERAL STATUTE UNDER WHICH THIS REGULATION WAS PROMULGATED, 15 U.S.C. § 687d, PLACES ENFORCEMENT OF THIS REGULATION WITHIN THE EXCLUSIVE AGENCY JURISDICTION OF THE SBA.

ARGUMENT

CONCLUSION

PRAYER

(Deleted)

FILED IN

COURT OF CRIMINAL APPEALS
JANUARY 12, 1987
Thomas Lowe, Clerk

Respectfully submitted:

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